RONALD NGWERUME
AND
FERRIS SANDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 22 March & 27 June 2018

Criminal Appeal

J Sithole, for the appellants
E Mavuto, for the respondent

WAMAMBO J: The appellants were convicted of theft of a motor vehicle as defined in s 113 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. They were sentenced to four and half years imprisonment of which two years imprisonment were suspended on condition of good behaviour.

They now appeal against both conviction and sentence. The grounds of appeal on conviction basically resolve around the analysis of the state witnesses' evidence by the court a quo.

The Prosecutor General's representative filed a concession in terms of s 35 of the High Court Act [*Chapter 7:06*]. We do not agree with the concession.

Appellants appeared before the court a quo charged with two co-accused. The facts are that appellants were employed at Autoworld where a motor vehicle a Chevrolet Captiva was stolen. The stolen motor vehicle was recovered some days after the theft abandoned at Spar, Greencroft now affixed with number plates that were illegally acquired.

To prove its case the State called three witnesses namely P.J Davies, P de Klerk, both logistical assistants at Autoworld and I. Mhondiwa the investigating officer.

P.J Davies gave evidence that first appellant was employed as a Bond Manager at Autoworld and his duties were to look after the bond and to ensure vehicles would be run and tested every month. The second appellant's duties were to do the pre-delivery inspection as soon as the vehicles arrived from South Africa.

In this case the vehicle in issue, was delivered on 15 October 2014. P.J Davies evidence was to the effect that the last record reflects that second appellant signed for the vehicle in issue for a test drive. This is supported by the PDI form signed by second appellant on 20 October, 2014. Before a vehicle enters or leaves, the bonded warehouse first appellant was supposed to make entries in the register. The long and short of it is that second appellant was supposed to deliver the vehicle in issue after the test drive to first appellant. However after the test drive there is no record of the vehicle returning to the premises.

The evidence points to collusion between first and second appellant. By the nature of their duties they worked hand in glove with each other. The very fact that the vehicle disappeared on their watch points to the fact that, both of them, were complicit in the disappearance of the vehicle.

Sight should not be lost that first appellant was the one in charge of the bonded warehouse and it was his responsibility to issue documents to prove the vehicle was taken into bond. It also became clear that for a vehicle to be driven out both appellants would know about it.

P. de Klerk gave evidence supporting the evidence of his colleague. He clarified that when the vehicle in issue was brought on 15 October 2014 he personally checked the vehicle before it was offloaded. First appellant was responsible as soon as the vehicle was offloaded. When the vehicle was being offloaded first appellant would physically check the vehicle, for defects and record them and then sign the proof of delivery. Thereafter the vehicle would be handed over for pre delivery inspection by among others, second appellant. After the pre delivery inspection the vehicle would be handed over to the first appellant. That the two appellants were in custody of the vehicle in issue is proven through the various documents they signed relating to the vehicle including PDI forms.

I Mhondiwa gave detailed testimony on the investigations he personally carried out. Of particular importance is his evidence around the recovery of the motor vehicle. He testified that he obtained information, implicating first appellant. Upon seizing first appellant's cellphone he discovered four photographs of the stolen vehicle, two of which were taken during day light while the other two were taken in the evening. These photographs were produced in evidence.

The credibility findings are unassailable. The court *a quo* properly analysed the witnesses' testimonies and considered the full circumstances of the matter.

The court *a quo* even went for an inspection in *loco* of the recovered vehicle and reached unfavourable findings on first appellant's explanation about where and how he obtained the

photographs of the stolen vehicle. The court *a quo* came to the correct conclusion that first appellant had access to the stolen vehicle at least twice after it had been stolen

There were attempts in the course of the trial to implicate one James Mushore who was allegedly given back the vehicle after the pre-delivery inspection. This came as an afterthought and had not been mentioned in the defence outline or asked of other state witnesses.

We find that the court *a quo* was alive to the circumstances of the case and applied the correct law on the facts.

It is clear from the circumstances of the case that circumstantial evidence principles were of particular application.

See *R* v *Bloom* 1939 AD 188 which incidentally was cited by state counsel in his concession as adverted to earlier. Also see *S* V *Vhera* 2003 (1) ZLR 668, *R* v *Sibanda* 1963 (4) SA 182 (SR) and *S* v *Mduduzi Tshakaza and 2 Others* HB 233/12.

In the analysis of the evidence we are also cognizant that circumstantial evidence in some instances such as in this case can be stronger that direct evidence.

The state need only prove the case beyond a reasonable doubt.

In *S* v *Sauls* 1981 (3) SA 172 (A) at 182G was pronounced as follows:

> "the state is however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more that the court is called upon to seek speculative explanations for conduct which on the face of it is incriminating."

The grounds of appeal against sentence are that the sentence induces a sense of shock. Further, that the court *a quo* failed to properly consider the mitigatory factors of the appellants particularly the fact that they are family men.

In the appellants' heads of argument besides citing general principles of sentencing the alleged grounds are not proven. There was further no attempt to cite case law of theft of motor vehicle matters to show the disparity in sentencing as alleged.

The record shows that the trial court considered among other factors the mitigatory factors as submitted by the appellants' legal practitioners which factors included that the appellants are sole breadwinners with minors children and that they did not benefit from the offence.

The trial court considered a host of other factors including the seriousness of the offence, the high moral blameworthiness of the appellants, the breach of trust and the fact that the offence was premeditated.

If regard is had to other decided cases of theft of motor vehicle the sentence passed in this case is not strikingly higher in comparison. See *Mackmate Mupfiga* v *The State* HH 789-16, *Herman Phillip Tembo* v *The State* HH 146-15 and *Clive Ushe* v *The State* HH 435-13.

In the result we order as follows:

The appeal against both conviction and sentence is dismissed.

HUNGWE J agrees ……

Mugiya & Macharaga Law Chambers, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners